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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 196

H. W. FERGUSON, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF TO BRIEF FOR THE UNITED STATES

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To the Honorable the Supreme Court of the United States:

I.

As your petitioner reads the brief filed herein by the United States it states (page 3) apparently as a fact proven "Mrs. Berkman's farm was within five miles of a big oil field." (R. p. 328- 438), and "Petitioner knew that there was a right hot oil play down there." (R. 239).

No witness testified and the record contains no evidence that "Mrs. Berkman's farm was within five miles of a big oil field."

The testimony was that "Mrs. Berkman's farm was about five miles from the nearest oil production," (i. e. from the nearest oil well). (R. 328).

That petitioner "knew that there was a right hot oil play down there" was the purport of the testimony of the government's witness McCombs. (R. 239). This petitioner swore "there was no market for leases in that area, because the Bank had two tracts in that immediate vicinity and there was no market for it. We were on the lookout for the sale of leases and to recover the money for the bank. (R. 419).

That there was no big oil field and no hot oil play in this area is a fact proven in that the Berkman farm was leased for oil to the Wellington Oil Company April 28th, 1937 (R. 180) and at the time O'Neil testified in September, 1940, three years and six months afterwards, the Company had never drilled an oil well on the land. (R. 227). Craddock testifying at the same time swore without contradiction that "O'Neill had told him that he had drilled a dry hole pretty close to the tract in the last two or three months." (R. 341).

II.

Also in the government's brief (pp. 3 and 4), it is stated, apparently as a fact proven, "Upon receipt of her

offer Petitioner instructed the Bank's attorney to accept it, but instead of having Mrs. Berkman deed the property directly to the Bank told him to have her deed it to a nominee for the Bank and we will give her a release of personal liability * * * on the payment of $1000.00. Petitioner also instructed the attorney to designate as the nominee S. K. Fowler, a farmer on some of the Bank's properties nearby. The attorney immediately complied with Petitioner's instructions and advised Mrs. Berkman's attorney that if she would convey the property free and clear of all liens to a nominee of the land bank and pay $1000.00, the land bank would deliver her a release of all personal liability on the note. This offer was accepted."

Again this was what McCombs testified. (R. 239).

Petitioner swore, "I told McCombs * * * that Mrs. Ferguson would take over the land and to deed it to Fowler for convenience. I talked to Charlie McCombs fully about that. I told him whose money was going to pay for it, and Mr. McCombs knew that Fowler was a big operator and honorable and I told him who he was and the purpose of the conveyance to Fowler. He knew all about it. (R. 415). I did not see that letter before it was sent. I do not think I had that letter. I instructed McCombs to say that we would accept the $1000.00 and we would release her of personal liability on the note, because I told McCombs that Mrs. Ferguson would assume the obligation or take care of the balance of the indebtedness and the taxes, * * * The first time I ever saw that

letter that McCombs wrote to Mrs. Sandbo was here in the court house last year." (R. 417).

III.

The government's Brief states: (p. 5)

The deed to Fowler did not name him as trustee or nominee for anyone. (Gov. Ex. 16-R. 83-84). The Government introduced evidence to show that title was conveyed to him as nominee for the Bank solely to prevent a merger of the mortgage; and thus facilitate a possible future sale of the property as the Bank had done in hundreds of other cases. (R. 239-247-251).

McCombs said nothing about preventing a merger of the mortgage in the reasons he gave for the Bank's having the title put in an individual rather than in the Bank. (R. 243-244).

There is nothing in the record to show that McCombs knew what the doctrine of merger in the law of real estate is.

A deed to a nominee of the Land Bank instead of a deed directly to the Land Bank would not, as a matter of law, have prevented a merger of the mortgage. A deed to a nominee, he holding only the legal title with no interest in the property and the Bank being the beneficial and real owner of the land would have as effectually merged its mortgage on the land as though the deed had been made directly to the bank.

Furthermore, when the deed was made to a nominee for the Land Bank, the rule was that said nominee executed a deed conveying the land to the Bank. (R. 53-412).

IV.

Further the Brief states (P. 7), "Mrs. Berkman's release recited that legal title is now vested in Fowler subject to the Bank's lien."

No such recital is contained in the release from the Bank to Mrs. Berkman. (R. 38).

This recital is contained in the letter dated April 5, 1937, from McCombs to the Land Bank in which he enclosed Mrs. Berkman's check for $1000.00 and a release of personal liability to be executed by the Bank in favor of Mrs. Berkman. (R. 36-37).

In this letter McCombs instructs the Bank "the title to this property is now vested in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the Bank."

The brief for the United States concludes "Petitioner had a fair trial and the verdict of the jury is supported by ample evidence." (Brief R. 12).

The record contains not a word of evidence either oral or written which in the slightest degree implicates your petitioner with the offenses charged in the indictment other than the testimony of McCombs.

McCombs' testimony was not only directly contradicted by your petitioner but was given the lie by his own

conduct of the Berkman transaction. He handled this as attorney for the Land Bank. Upon receipt of Mrs. Berkman's check for one thousand dollars, together with the deed from Mrs. Berkman to Fowler, he sent the check to the Land Bank in a letter in which he instructed the Bank that "the title to this property is now vested in S. K. Fowler of Corpus Christi, Texas subject to the lien in fee of the Bank." (R. 36-37).

On the same days, April 5th, 1937, he enclosed the deed from Mrs. Berkman to Fowler in a letter to your petitioner individually in which he inquired, "If either you or Mr. Fowler wants an opinion from me as to *his* title, please let me know so I may order the necessary documents and have them filed for record in Nueces County and included in a Supplement." (R. 56).

McCombs did not inform the Bank that Fowler was a nominee for the Land Bank; nor did he prepare a deed to be executed by Fowler conveying the property to the Land Bank, (R. 252) as he would have done had he understood that Fowler was the nominee of the Bank.

McCombs' testimony was further given the lie by his sworn admission that on two different occasions in July, 1938; once in the presence of Pool, the Secretary and once in the presence of your petitioner he had stated to John Pope, "I know all about that transaction. I handled the whole thing and I know that the deed to Fowler was not made in trust for the Bank; that Fowler was not holding the land in trust for the Bank." (R. 262-265).

Pope also testified that in the conversation had in the presence of Ferguson, McCombs had stated with reference to the oil lease, "that the money went to Mrs. Ferguson; that she benefited by the transaction; that Fowler was merely holding the property for Mrs. Ferguson because Mrs. Ferguson had put up a certain sum of money to bring the loan up in current form represented by taxes and by principal and interest." (R. 288-289).

Who was McCombs? And what was his motive for testifying falsely against your Petitioner?

From February 17th, 1923 to March, 1939, (R. 252), he had been a member of a law firm which had been attorneys for the Bank receiving for their services very munificent salaries which were fixed by your petitioner. For many years they had received an annual salary of $20,000; some years they had received as much as $25,000.00 or $30,000.00. The last year they served the Bank during which McCombs was head of the firm, they had been paid $17,000.00 (R. 283).

In 1937, the year of the Berkman transaction, McCombs' relationship with your Petitioner was and had been for many years very close and your Petitioner reposed all confidences in McCombs, (R. 291). At the time of the Berkman transaction McCombs and your Petitioner were the warmest of friends, (R. 455). McCombs was a stockholder in the Bank and had served on the Board of Directors for two or three years, (R. 298). The Board of Directors by resolution at the first

of each year authorized the President (your Petitioner) to hire such attorneys and at such salary as he deemed to the best interest of the Bank, (R. 279). Your Petitioner had organized the Bank in 1919 and annually since that time to the time of his conviction in September, 1939, had been by the Board of Directors each year elected President. (R. 403). He therefore had been President of the Bank during the entire period in which McCombs' law firm had been the attorneys for the Bank. By authority of the Board of Directors he personally had employed this law firm and had fixed their salary. A fact proven in the case was that for sixteen years whatever McCombs had: the clothes on his back; the food that he ate; the roof over his head had come from the hand of your Petitioner. Yet in this case where your Petitioner a friend and benefactor of long standing was on trial on a charge which involved his character, his good name, and his personal liberty, McCombs gave the only testimony upon which the Government could depend for a conviction.

What had happened?

In March, 1939, six months before the indictment was found, your Petitioner failed to renew the Bank's contract with McCombs' law firm; he discharged them as the Bank's attorneys; in simple English, he fired McCombs and his firm, (R. 406).

Not a jury in America would have convicted a dog on such testimony as McCombs'; contradicted and discredited as it was.

Nor did the jury in the instant case so convict your Petitioner.

They brought in a verdict of guilty because the District Judge in his charge iterated and reiterated that your Petitioner was guilty.

At the outset he told them that the evidence showed or tended to show that in the deed from Mrs. Berkman to Fowler that Fowler was the nominee of the land bank. (R. 463).

Thus telling them how to decide it, the Judge then submitted the issue to the jury.

Next, he instructed them that Ferguson being President of the bank was without power to take anything that was the bank's and name someone as trustee to hold for him personally or for his wife. (R. 465). Here he told the jury that the Berkman farm was the property of the Bank before Mrs. Berkman deeded the same to Fowler.

That being President of the Bank Ferguson was not at liberty to deal with the property of the Bank as though it were his own. (R. 468). He here repeats that the Berkman farm was the property of the Bank.

That in the transaction whereby he paid to the Bank $1250.00 of his wife's money putting the Berkman loan in good standing and had Mrs. Berkman deed the land to Fowler subject to the Bank's lien for the benefit of his wife Ferguson was using opportunities which came

before him to appropriate proceeds of property rightfully belonging to the Bank. (R. 468).

That the jury could presume an intent on the part of Ferguson to defraud the bank from his conduct of the transaction. (R. 467-468).

That if Ferguson knew or believed that the Berkman land would yield a profit over and above the indebtedness and caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife, then, that in receiving said profits he was guilty of abstracting the same from the Bank. (R. 467-468).

A corollary to this was that if he did not believe that the investment would yield a profit; if he believed that the investment would be a loss he would not be guilty.

This is not the law.

Naturally Ferguson believed that the Berkman land would yield a profit over and above the indebtedness; otherwise, he would not have put $1250.00 of his wife's money in the land subject to the lien of the bank securing said indebtedness.

The jury has just heard him in effect so testify.

Under this instruction therefore in the minds of the jury, Ferguson by his own testimony was guilty of abstracting monies from the bank.

Accordingly, in obedience to this charge, the jury found your petitioner guilty.

Upon this verdict of guilty, the District Judge sentenced your petitioner to imprisonment in the penitentiary for eighteen months, and to pay a fine of ten thousand dollars!

This charge of the District Judge with its lengthy and out of place dissertation on the obligations of the President of a bank to its stockholders for a breach of which said stockholders could hold him liable in equity; with its statement in effect and repeated that the Berkman land even before the deed from Mrs. Berkman to Fowler was the property of the bank; with its misstatements of the evidence and its erroneous statements of the law, confused and misled the jury to your petitioner's prejudice. These identical instructions were condemned and held ground of reversal by the Circuit Court of Appeals on the first appeal of the case. (R. 112 Fed. (2d) 132).

In this case, the District Judge erroneously in effect instructed the jury that if a President of a Joint Stock Land Bank invested $1250.00 of his wife's money in a tract of land upon which the Bank held a lien for the security of an indebtedness; and the investment yielded a profit which he received and paid to his wife instead of to the bank, he violated Section 984, Title 12, U.S.C.A.

The Circuit Court of Appeals affirmed.
This was error.

This Court will grant certiorari to correct an erroneous construction of a provision of the Federal Farm Loan Act.

Federal Land Bank of Berkely vs. Samuel S. Warren, et al 292 U. S. 53; 78 L. Ed. 1120.

ADDITIONAL ARGUMENT IN SUPPORT OF APPLICATION FOR CERTIORARI

The Government's case: the prosecution, the conviction and sentence of your Petitioner, rest upon the contention that by the deed from Mrs. Berkman to Fowler the land became the property of the Land Bank.

When Mrs. Berkman executed this deed March 30th, 1937, she was the owner in fee of the land subject to the lien of the Bank to secure the payment of the Berkman note.

By the execution and delivery of this deed her fee simple title passed to Fowler subject to the lien of the Bank.

It is admitted that Fowler paid nothing for the land; was not the real owner; but held only the legal title as nominee or trustee for the beneficial or real owner subject to the lien of the Bank.

If this real and beneficial owner were the Land Bank as a matter of law, its lien on the land to secure the payments of the Berkman note would have become merged in its superior fee simple title in the land; would have been extinguished; would have ceased to exist.

There can be no debate about this proposition.

But the admitted facts were that the Berkman note and the lien of the Bank on the land to secure its payment was not extinguished; did not cease to exist; but by express provision in the release of the Bank to Mrs. Berkman (R. 38) in the deed from Mrs. Berkman to Fowler (R. 83) and in the deed from Fowler to Deutschman (R. 134) the Berkman note and the Bank's lien on the land to secure its payment were kept in full force and effect, until paid off by Deutschman in January, 1938, (R. 58).

Also a fact proven in the case is that the Bank paid Mrs. Berkman nothing for her conveyance to Fowler; no consideration passed from the Bank to Mrs. Berkman for the execution by her of the deed to Fowler.

The consideration proposed by Mrs. Berkman was the satisfaction of the Berkman indebtedness to the Bank (R. 29).

This proposition was refused (R. 30); and the Berkman note and the lien of the Bank on the land to secure the payment of the note to the Bank was kept in full force and effect during the entire period in which Fowler held the legal title.

Summed up the Government's contention is that the Land Bank paying nothing for the land became its owner when Mrs. Berkman conveyed the same to Fowler; and that throughout the time Fowler held the legal title, the Bank being the real and beneficial owner at the same time held a lien on its own land to secure the payment of a note payable to itself in full force and effect.

This is a legal absurdity.

Yet the Circuit Court of Appeals sustained this contention of the Government when it affirmed the judgment of the District Court which sentenced your petitioner to the Penitentiary for eighteen months and to pay a fine of ten thousand dollars!

Another uncontroverted fact which has been ignored by the Government and by every court which has passed upon the case is that your Petitioner paid to the Land Bank $1250.00 of his wife's money (1) to satisfy the balance of the delinquencies on the Berkman loan after the payment by Mrs. Berkman of $1000.00; (2) to pay the back taxes which had accumulated against the land; (3) to pay the July, 1937 installment of principal and interest; and (4) to pay the 1937 State, County and School District taxes on the land. (R. 420).

What was the consideration for the payment to the Bank of this $1250.00?

Mrs. Ferguson was not indebted to the Bank.

Unless, by these payments for and on account of Mrs. Berkman, she became the owner of the land by the deed from Mrs. Berkman to Fowler, subject to the Bank's lien, she was under no obligation to pay this money to the Bank. If she were the owner of the land, she was the principal obligor for the payment of the Berkman indebtedness as the Bank had released Mrs. Berkman and

the estate of Andrew Berkman of all personal libability for the payment of this indebtedness (R. 38).

Respectfully Submitted.

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